IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4116/2016

In the matter between:

ABSA BANK LTD Applicant

and

ERASMUS DANIEL POCKLINGBERG Respondent

HEARD ON: 10 NOVEMBER 2016

JUDGMENT BY: E.K. TSATSI, AJ

DELIVERED ON: 9 FEBRUARY 2017

INTRODUCTION

[1] This is an opposed application for summary judgment in which the applicant sought three different actions against the respondent, under case numbers 4079/2014, 1417/2016, and 4116/2016. The applicant sought the following relief:

1.1 confirmation of three separate credit agreements conducted in respect of certain vehicles;

1.2 return of the vehicles which form the basis of the various credit agreements;

1.3 authorisation to be granted to the applicant to approach the Honourable court on the same papers , supplemented if required , for damages;

1.4 interest;

1.5 costs of suit.

[2] This judgment contains three different applications referring to the same applicant and the same respondent. The applicant is the plaintiff in the main action and the defendant is the respondent in the main action. For the sake of convenience than parties will be addressed as applicant and respondent.

FACTS

[3] Under case number 4079/2016, the facts are as follows:

On or around 23 November 2012 at Bloemfontein the applicant and the respondent entered into a partially written and partially oral agreement (herein referred to as "the agreement"). In terms of the agreement the applicant sold 2012 Jeep Wrangler 2.8 CRD UNLTD A/T with engine number DL515120 and chassis number 1C4BJWL52DL515120 (herein referred to as "Jeep Wrangler").

Despite the delivery of the Jeep Wrangler to the respondent, ownership of the Jeep Wrangler remained vested within the applicant. In terms of the agreement the recoverable amount of the Jeep Wrangler is payable as follows:

3.1 An initial deposit in the amount of R10 000.00 was paid by the respondent.

3.2 A first instalment of R7091.37 was payable on 07 January 2013.

3.3 Thereafter 70 equal instalments of R7 091,37 payable on each corresponding day of each and every month .

3.4 A final payment of R125 481.99.

[4] The agreement further stated that should the respondent fail to pay the instalments on due date or fail to satisfy any of his other obligations in terms of the Agreement, the applicant shall without prejudicing any of his rights in law be justified in cancelling the agreement and in the instance of such cancellation: Claim return and repossession of the Jeep Wrangler, claim payment of the difference between the amount outstanding at date of cancellation of the agreement less a rebate on finance charges calculated from date of termination of the agreement and the amount at which the Jeep Wrangler is valued in terms of the agreement of the re-sale value thereof whichever is greater, claim the interest on the amount referred to in paragraph 6 calculated at an interest rate of 1.000% below prime lending rate per annum with the current prime lending rate being 10.50% per annum,

costs on party to party scale, claim all expenses incurred in tracing the respondent before or after the institution of action, attaching the vehicle, removing it valuing it, sorting it and the sale of the vehicle.

[5] According to the applicant, the respondent has breached the agreement in that he has failed to pay the instalments in terms of the agreement and has been in default for at least twenty (20) business days. The full outstanding balance is R288 192.70 as at 11 August 2016. The applicant also alleged that in due satisfaction of the requirements of section 129 of Act 34 of 2005 a letter was sent by the applicant to the respondent on 15 August 2016 by pre-paid registered post/mail to the *domicillium citandi et executandi* address of the respondent. In the said letter the respondent was informed that he has not satisfied his obligations and that the arrear instalments amounted to R26 401.40 as at 11 August 2016 and that the arrear instalment had be paid within ten (10) days of posting of the letter.

[6] Under case number 4117/2016 the facts are similar to the ones in case number 4079/2016 above and apply *mutatis mutandis* except the following:

In terms of the agreement the applicant sold 2013 Jeep Grand Cherokee 3.OLV6 CRD with engine number EC235135 and chassis number 1C4RJFGM4EC235135 (herein after referred to as "the Jeep Grand Cherokee"). In terms of the agreement the recoverable amount of the Jeep Grand Cherokee was payable as follows:

An initial deposit of R0.00, a first instalment of R12 451.01 payable on 7 January 2014, thereafter 71 equal instalments of R12 451.04 payable on each corresponding day of each and every month. The agreement further stated that should the respondent fail to pay the instalments on due date or fail to satisfy any of his other obligations in terms of the agreement the applicant shall without prejudicing any of his other rights in law be justified in claiming interest on the amount referred to in paragraph six calculated at an interest rate of 1.300% prime lending rate per annum with the current prime lending rate being 10.50% per annum.

[7] The respondent has breached the agreement in that he has failed to pay the instalments in terms of the agreement and has been in default for atleast twenty (20) business days. The full outstanding amount is R589 082.22 as at 16 August 2016. In due satisfaction of the requirements of Section 129 of Act 34 of 2005 a letter was sent by applicant to the respondent on 17 August 2016 by pre-paid registered post/mail to the *domicilium citandi et executandi* address of the respondent. In the said letter the respondent was informed that he had not satisfied his obligations and that the arrear instalments amounted to R70 925. 93 as at 16 August 2016 and that the arrear instalments had to be paid within ten days posting of the letter.

[8] Under case number 4116/2016 the facts are similar to the ones in case number 4079/2016 and apply *mutatis mutandis* except the following:

In terms of the agreement the applicant sold 2014 Honda Brio 1.2 Comfort 5DR A/T with engine number L12B33015685 and chassis number MAKDD18FLDN20031 (herein after referred to as "the Hoonda Brio"). In terms of the agreement the recoverable amount of the Jeep Grand Cherokee was payable as follows: An initial deposit of R0.00, a first instalment of R2 647.02 payable on 1 June 2014, thereafter 71 equal instalments of R2 647.02 payable on each corresponding day of each and every month. The agreement further stated that should the respondent fail to pay the instalments on due date or fail to satisfy any of his other obligations in terms of the agreement the applicant shall without prejudicing any of his other rights in law be justified in claiming interest on the amount referred to in paragraph six calculated at an interest rate of equal to prime lending rate per annum with the current prime lending rate being 10.50% per annum.

[9] The respondent has breached the agreement in that he has failed to pay the instalments in terms of the agreement and has been in default for atleast twenty (20) business days. The full outstanding amount is R 130 602.54 as at 11 August 2016. In due satisfaction of the requirements of Section 129 of Act 34 of 2005 a letter was sent by applicant to the respondent on 17 August 2016 by pre-paid registered post/mail to the *domicilium citandi et executan*di address of the respondent. In the said letter the respondent was informed that he had not satisfied his obligations and that the

arrear instalments amounted to R 10 198.80 as at 11 August 2016 and that the arrear instalments had to be paid within ten days of posting of the letter.

ISSUES

[10] The main issue in this application was whether or not the applicant discharged, on a balance of probabilities, the *onus* that rested upon the applicant that it satisfied the requirements of summary judgment for this Court to grant the applicant the relief sought.

SUBMISSIONS

[11] It was submitted on behalf of the applicant that section 129 notices of National Credit Act 34 of 2005 ("the Act") were sent to the respondent by both the applicant and its attorneys. It was further submitted on behalf of the applicant that the respondent failed to respond to such notices but instead referred the said notices to the National Credit Regulator for assistance in appointing an Alternative Dispute Resolution Agent for the respondent. After there was no response from the respondent the applicant then issued summons against the respondent. The latter filed and served his notice of intention of defend and accordingly the applicant lodged a summary judgment application. The argument of behalf of the applicant was that the

respondent delayed in his response to the section 129 notices even though responding to such notices in time could never have been a valid reason to approach the National Credit Regulator. The submission on behalf of the applicant was that approaching the National Credit Regulator was not an option open to the respondent. The argument on behalf of the applicant was that the respondent failed to pay the instalments in terms of the agreements reached and that the respondent has been in default for atleast twenty (20) business days. The applicant relied on the fact that the contract between it and the respondent has been cancelled. The applicant's submission was that the law is clear that even any valid option in terms of Section 129 of the Act taken belatedly cannot be entertained as the creditor became entitled to continue with the proceedings when the applicable time lapsed.

[12] A submission on behalf of the respondent was that the applicant was not entitled to move for summary judgment as summary judgment is an extraordinary stringent and drastic measure that denies the respondent an opportunity to put up an adequate defence. Counsel for the respondent further argued that summary judgment permits for a final judgment to be given against a party without trial. As a result the applicant's papers should be beyond reproach and technically correct. The submission on behalf of the respondent was that the applicant papers were not beyond reproach. It was further submitted that the applicant was not entitled to move for cancellation of the contract by way of summary judgment proceedings as the applicant did in this matter. The submission on behalf of the

respondent was that on or around the 8th of August 2016 the respondent referred various credit agreements on which the applicant's claims were based to the National Credit Regulator for the appointment of the Alternative Dispute Resolution Agent and therefore the applicant was precluded from launching a summary judgment application. Counsel for the respondent argued that the applicant's deponent failed to mention the preceding fact in the applicant's particulars of claim or affidavit which seriously calls to question deponent's true personal knowledge of the Plaintiff's cause of action. Further submission on behalf of the respondent was that the respondent disputed the amount and interest claimed by the applicant under and in terms of the various credit agreements concluded between the applicant and the respondent. It was submitted for the respondent that the attorney of record of the respondent addressed a letter informing the applicant the respondent wished to refer all credit agreements to an Alternative Dispute Resolution Agent but the applicant failed to respond to such a letter instead opted to move for a summary judgment.

THE LAW

[13] Section 127 of the Act provides that (1) "*A consumer under an installment agreement, secured loan or lease-(a) may give written notice to the credit provider to terminate the agreement; and (b) if- (i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or (ii) otherwise, return the goods*

that are the subject of that agreement to the credit provider's place **of** *business during ordinary business hours within 10 five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider".*

[14] In *Fischereigesellschaft F Busse & Co Kommanditheseilschaft v African Frozen Products (Pty) Ltd* **1967 (4) SA 105 (C), at 111A-B**, Theron J held -

As was pointed out in *Misid Investments (Pty) Ltd v Leslie*, **[1960 (4) SA 473 (W)] at p. 474**, the applicant in summary judgment proceedings must comply strictly with the requirements of the Rules of Court. In his judgment in this case Munnik, A.J. (as he then was), indicated that to his mind the approach of the Court when objections were raised on technical grounds to an application for summary judgment had been correctly set out by Marais J, in *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd*, **1959 (3) SA 362 (W) at p. 366**, where he stated:

'The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial.'

[15] In *Maharaj v Barclays National Bank Ltd* **1976 (1) SA 418 (A) at 426B-C** Corbett JA, as he then was, says:

"All that a Court enquires into is: *(a)* whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be."

[16] In *Breitenbach v Fiat S A (Edms) Bpk* **1976 (2) (TPD) 226 at 229E-H**, the Court was quoting from a judgment of Miller J in *Shepstone vs Shepstone* **1974 (2) SA 462 (N) at p467E-H**, which reads as follows:

"The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the Plaintiff has an unanswerable case."

That is the first quotation and the second is:

"...... a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial."

[17] Summary judgment must be refused if the defendant discloses facts which, accepting the truth thereof, or only if proved at a trial in due course, will constitute a defence (see *Raphael and Co v Standard Produce Co (Pty) Ltd* **1951 (4) SA 244** (C) 245 E – G) While the defendant must fully present the facts upon which his defence is based, he need not deal in detail with either that defence or the evidence in support thereof (see: *Absa Bank Ltd v Coventry* **1998 (4) SA 351** (N) 353 C - H). Defects in the opposing affidavits are not necessarily fatal for the defendant as the court is entitled to adopt a lenient approach to the allegations contained therein and it is entitled to draw reasonable inferences from those allegations (see *Koornklip Beleggings (Edms) Bpk v*

Allied Minerals Ltd **1970 (1) SA 674 (C) 678 E).**

APPLICATION OF THE LAW TO FACTS

[18] There are factual disputes in this matter. The applicant was of the view that it was entitled to terminate the agreement between it and the respondent. The respondent is of a different view. I agree with the respondent. Section 127 of the Act entitles the consumer in this case the respondent to terminate the agreement by first giving notice to the credit provider to terminate the agreement and sell the goods which are the subject of litigation if such are in the possession of the credit provider. It is my considered view that section 127 does not apply in this case as the respondent has not sent notice to the applicant to terminate the agreement. Even though there was a clause in the agreement between the parties that entitles the applicant to cancel the agreement, the Court still has a discretion to grant or refuse summary judgment.

[19] The other dispute between the two parties was that of amount and interest charged. The respondent disputed the amount and interest charged under and in terms of the various credit agreements. The adjudication of a summary judgment application does not include a decision on factual disputes. Summary judgment proceedings are not and never have been intended as a forum for the resolution of factual disputes (*Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Botel (Pvt) Ltd* **1973 (3)**

SA 575 (R) 578 A).

[20] It is trite that in order to successfully oppose a summary judgment application, the respondent need to satisfy the Court that they have a *bona fide* defence to the applicant's claim by fully disclosing, the nature and grounds of their defence and the material facts upon which the defence is relied on. Where the defence raised, if the matter were to go on trial, has a good prospects of successfully defeating the claim, then the Court in the exercise of its discretion will refuse to grant the summary judgment. I am satisfied that the respondent raised bona fide defences which may defeat the claim. Some of the defences raised by the respondent cannot be determined by way of affidavits but at a trial. A trial is the proper forum for resolving factual disputes, because affidavits are not suitable for that purpose.

[21] The respondent attempted to involve the services of an alternative dispute resolution agent with no success. Section 130 (3) (c) (i) of the Act makes provision for the services of the alternative dispute resolution agent. The applicant would not be entitled to approach the Court if the matter was already before the alternative dispute resolution agent. My considered view was that this matter was not before the alternative dispute resolution agent therefore the applicant was not prevented from approaching the Court. This fact only could not make the summary judgment application successful as there were other hurdles like the

defences raised by the respondent that would not make the granting of summary judgment possible.

[22] It is trite that summary judgment constitutes an extraordinary stringent remedy and permits a final judgment against a party without being given the opportunity to ventilate issues. Even if summary judgment is not granted the applicant still has an opportunity to go to trial and proof its case. However if summary judgment is granted the respondent will be denied any opportunity of going to trial to demonstrate that it had a bona fide defence.

[23] I have considered submissions and authorities submitted by counsel for the applicant and respondent. I am not satisifed that the applicant discharged, on a balance of probabilities, the *onus* that rested upon the applicant that it satisfied the requirements of summary judgment for this Court to grant the applicant the relief sought.

[24] In all the circumstances, the respondent has made out a case and set out facts upon which I can exercise discretion, which I hereby do, in his favour.

[25] I accordingly make the following order.

25.1 The application for summary judgment in terms of case numbers 4116/2016, 4117/2016 and 4079/2016 is refused;

25.2 The respondent is granted leave to defend the main action and is ordered to file a plea, if any, in terms of case numbers 4116/2016,4117/2016 and 4079/2016 before or on 24 February 2017;

25.3 Costs shall be in the main action.

p p **E. K. Tsatsi, AJ**

On behalf of the applicant:	Adv. E. G. Lubbe Instructed by: Strauss Daly Inc. BLOEMFONTEIN
On behalf of the respondent:	Adv. C. Snyman Instructed by: JG Kriek & Cloete Attorneys BLOEMFONTEIN